No. 76-1150

Supreme Court of the United States

OCTOBER TERM, 1976

LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Appellants,

v.

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD REIDER, Commissioners of the Fish and Game Commission of the State of Montana,

Appellees.

ON APPEAL FROM THE U. S. DISTRICT COURT
DISTRICT OF MONTANA
BUTTE DIVISION

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

At issue is the Montana big game hunting license scheme which substantially discriminates against nonresidents. Appellants, nonresident hunters and a resident hunting guide, challenge the discrimination on the basis of the privileges and immunities clause, Art. IV, Sec. 2, and the equal protection clause, Am. 14.

Perhaps the central issue in the present case is whether the Montana statutory scheme, which cannot reasonably be justified on any cost basis, can nevertheless survive the instant constitutional challenge on the basis that political support of the local citizenry for the game management program may evaporate in the absence of discrimination against nonresident hunters. Appellants have cited the egregious implications which follow from the District Court's rationale. Memorial Hospital v Maricopa County, 415 U.S. 250 (1974), "[t]he state may not employ an invidious discrimination to sustain the political viability of its programs."

415 U.S. at 266.[1]

Nothing more than a passing reference to the political rationale of the District Court appears in the brief of Appellees (p. 33). No authority is advanced to support the proposition that an otherwise unjustifiable discrimination may survive a constitutional challenge because local political support may be eroded in the absence of the discrimination. Given the obvious care taken by Appellees in the construction and wording of their answer brief, the failure to support the rationale of the District Court cannot be discounted as an inadvertent omission. Rather, this omission appears to be virtually an admission that the rationale of the District Court is indefensible.

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[1]Aside from the inherent inappropriateness of justifying a discrimination on political grounds, Appellants also have emphasized that the record is barren of any evidence that support of Montana citizens for the game management program would decrease in the absence of the discrimination. Absent such evidence, it was highly inappropriate for the District Court to speculate on such factor. (See Appellants' opening Brief, pp. 51-55.)

Viewed from this perspective it appears that Appellees, rather than standing on the reasoning of the District Court, seek to re-open the issue of whether the instant discrimination is justifiable on factors other than the imagined vicissitudes in local political support. In this connection, the brief of Appellees, while referencing many points in the record which arguably establish a conceivable basis for the discrimination, fails to set forth the evidence in a systematic enough manner to enable the reader to conclude that the discrimination is factually defensible. For example, Appellees seek to justify the combination license requirement for nonresidents[2] by briefly alluding to the illegal practice of

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[2]The big game "combination license" is specifically defined in Appellants' opening Brief (p. 5, fn. 2). Essentially, Montana allows its residents to purchase elk licenses solely, but requires non-residents who wish to hunt for elk to purchase a combination license entitling them to one elk, one deer, and one black bear. (The pre-1976 combination license included one elk and two deer.)

"license swapping" (Appellees' brief, p. 7). The brief implies that nonresidents tend to engage in "license swapping" to a greater extent than residents and that the combination license is designed to frustrate that practice. The full record, however, indicates that residents may well engage in illegal license swapping as much or more than nonresidents (Tr. p. 258), and that the incidence of swapping, an illegal practice, may actually be lower for nonresidents because nonresidents tend to a greater degree to use the services of outfitters who are equally responsible for enforcing the game laws. (Tr. pp. 253, 254.) Therefore, the practice of requiring the combination license for nonresidents only finds no reasoned support from the "license swapping" phenomenon.

Instead of attempting to develop these factual issues in reasonable detail, the Appellants fall back on their entitlement to the presumption of consitutionality. However, even considering the presumption of constitutionality, the District Court, after compiling an extensive factual record, unanimously found the discrimination unjustifiable on the factual grounds

now urged by Appellees. The two-member majority found: "On the consideration of ...[plaintiffs'] evidence, the state's evidence opposing it, and with due regard to the presumption of constitutionality, ...the ratio of 7.5 to 1 cannot be justified on any basis of cost allocation." (Emphasis added.) (A. 62, 63.)[3] The factual points advanced by Montana to support the combination license requirement were not discussed by the majority, but it is clear that the majority found such arguments also untenable.[4]

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[3]Dissenting Judge Browning agreed with the two majority judges on this point. (A. 74)

[4]Judge Browning summarized this in his dissent as follows:

> The majority does not discuss the other purposes advanced by the state to support the discrimination--implying (and I agree) that there is no reasonable relationship between the discriminatory license fee and any of the other purposes advanced by the state. Each such justification is shown by the record to be either logically or factually unsupportable. (A. 74, 75.)

It is undoubtedly the case that the reason the majority turned to the political justification to support the license discrimination is because the discrimination is not supportable on the grounds advanced by the state. Given this posture,[5] mere passing reference to points in the record, coupled with reliance on the presumption of constitutionality, will not suffice.

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[5] See Vol. 5A Moore's Federal Practice, Par. 52.12, p. 2762:

> Where there is a direct appeal from a district court to the Supreme Court and the latter Court is, therefore, sitting as an initial appellate court, it performs the same duty in determining the sufficiency of the evidence to support the findings that a court of appeals does in the bulk of appeals that go initially to this intermediate appellate court (citing United States v. United States Gypsum Co. (1948), 333 US 364, and other cases). And in determining the sufficiency of the evidence Rule 52(a) is applicable, and hence factual findings are not to be set aside "unless clearly erroneous," with "due regard . . . given to the opportunity of the trial court to judge of the credibility of the witnesses."

Appellees attempt to argue throughout their brief that Montana's discrimination against non-residents is generally a reasonable device designed to accomplish conservation purposes. Appellees state: "Hunting licenses are universally recognized as an economic control mechanism whereby a state may regulate the harvest of its wildlife resources." (Appellees' brief, p. 11.) This "universal" recognition is not at all as clear as the statement would indicate. In the District Court the State of Montana tried to justify the differences between license fees for residents and nonresidents on a cost basis, not a conservation basis. In any event, in the 1975 season, the fee for an elk license was $4,00 for the Montana resident. (A. 53.)[6] The fee for a nonresident (combination) license was $151.00. (A. 53.)[7] It cannot seriously be argued that the $4 fee in 1975 for a resident elk license was an "economic control mechanism

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[6]In 1976 and presently it is $9.00. (A. 54.)

[7]In 1976 and presently it is $225.00. (A. 55.)

whereby a state may regulate the harvest of its" game. Nor can the present fee of $9 be so viewed. Virtually no hunters will be discouraged by such low fees, and there is no evidence in the record which would indicate such disincentive.

On the other hand, it may be the case that the high fees charged nonresidents do serve as a disincentive which curbs the number of nonresident hunters. The result is that Montana may be using the license fee to discourage nonresidents under the guise of conservation of the resource while making no attempt to restrict its own residents. This Court decided Douglas v Seacoast Products, Inc. 429 U.S. ____, 52 L Ed. 2d, 304, on May 23, 1977, finding invalid a similar state scheme, stating:

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[8]Indeed, Appellees argue: "[t]he efficacy of the tool [higher license fees for nonresidents] is evidenced in the fact that as the license fee for nonresidents has increased a reduction in the number of nonresident hunters has occured in the subsequent year (R. 14, 15)." (Appellees' brief, p. 32.)

> Appellant claims that the challenged statutes have a legitimate conservation purpose. He argues that §81.1 is a valid response to the grave problem of overfishing of American marine stocks by foreign fleets....
>
> The claims are specious. Virginia makes no attempt to restrict the quantity of menhaden caught by her own residents. A statute that leaves a state's residents free to destroy a natural resource while excluding aliens or non-residents is not a conservation law at all.
>
> (Fn. 21, 52 L Ed. 2d at 320.)

Thus, there appears to be at least some question whether Montana's hunting license discriminatory system is designed to accomplish conservation of the resource. In any event, the imposition of de minimis fees on residents, while gouging the non-residents is not consistent with the principle established in Douglas v Seacoast Products, Inc., supra.[9]

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[9]It should also be noted that Montana law contains other provisions which appear to be more directly designed to conserve the resource. For instance, not more than 17,000 nonresident big game combination licenses may be sold in any one license year. (Sec. 26-202.1(4) R.C.M.) (No numerical restriction is placed on resident elk or deer licenses.) This provision is not at issue in this case for the reason, in part, that the number of nonresident hunters does not approach this limit. However, it appears similarly faulty because it also attempts to accomplish conservation at the expense of the nonresident while wholly ignoring the problem of resident hunters. At least, however, this numerical restriction is a direct attempt to foster conservation.

II. MONTANA CANNOT SUPPORT ITS DISCRIMINATION AGAINST NON-RESIDENTS ON THE THEORY THAT THE STATE "OWNS" THE WILDLIFE

Appellees attempt to find support for Montana's discrimination against non-residents on the theory that the state "owns" the wildlife. It is not clear how far Appellees would carry the ownership theory. Certainly they fall short of arguing that because the state owns the wildlife it can do with it what it wants. Appellees do, however, argue that the "ownership doctrine remains alive and well," (Appellees' brief, p. 12) and that, as a consequence of such doctrine, the state has a "special power" (Id., p. 8) over its wildlife and a "peculiar

power...over wildlife...in consequence of a special relationship between the state and its people" (Id., p. 14). This all seems to amount to a position that Montana's power to regulate game is stronger than its routine police powers. This position cannot be sustained in light of this Court's recent decision in Douglas v Seacoast Products, supra:

> In any event, "[t]o put the claim of the State upon title is," in Mr. Justice Holmes' words, "to lean upon a slender reed." Missouri v. Holland, 252 U. S. 416, 434 (1920). A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds or animals. Neither the State nor the Federal Government, any more than a hopeful fisherman or hunter, have title to these creatures until they are reduced to possession by skillful capture. Ibid; Geer v. Connecticut, supra, 161 U. S., at 539-540 (Field, J., dissenting). The "ownership" language of cases such as those cited by appellant must be understood as not more than a 19th-century legal fiction expressing "the importance of its people that a State have power to

> preserve and regulate the exploitation of an important resource." Toomer v. Witsell, 334 U. S. 385, 402 (1948); see also Takahashi v. Fish & Game Commission, 334 U.S. 410, 420-421 (1948). Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution. (52 L Ed. 2d at 319, 320.) (Emphasis added.)

Thus, the present case presents no special, or peculiar, factors which entitle Montana's discrimination against nonresidents to a greater presumption of validity than that of the typical case involving a Federal Constitutional challenge to the exercise by a state of its routine police powers.

III. MONTANA'S HUNTING LICENSE SCHEME IS NOT IMMUNE FROM THE APPLICATION OF THE PRIVILEGES AND IMMUNITIES CLAUSE.

It is argued by Appellees that the privileges and immunities clause, Art. IV, Sec. 2, is not applicable to Montana's discriminatory hunting license scheme because the right involved is not a "fundamental" one. Toomer v Witsell, 334 U. S. 385 (1948) found invalid the discriminatory

commercial shrimping license scheme of South Carolina with no explicit finding that the right involved was "fundamental." The interest involved in Toomer is the right to pursue a common commercial calling--similar to an interest in employment. It can be said from recent decisions of this Court in the equal protection context that the right to employment is not "fundamental." Massachusetts Board of Retirement v Murgia, 427 U.S. 307 (1976).[10] Thus, the interest focused upon in Toomer cannot be said to have been (or to be) a "fundamental" interest. Nevertheless, the privileges and immunities clause was invoked. Furthermore, Austin v New Hampshire, 420 U.S. 656 (1975) invalidated New Hampshire's commuter tax on the basis of the privileges and immunities clause, Art IV, Sec. 2. Again, there was no quest in that case for an infringement of a right thought to be "fundamental." Appellees argue that the privileges and

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10 While the Murgia case dealt with the issue of government employment, the implications of the Court's opinions carry over to all employment.

immunities clause has long been held to require exemption for nonresidents from "higher taxes or impositions" citing Corfield v Coryell 6 Fd Cas. 546 (No. 3230) (E.D. Pa. 1823). This language in Austin can hardly be construed as limiting the application of the privileges and immunities clause to only those rights which are "fundamental."

In any event, the present Montana licensing scheme is a "tax," or certainly an "imposition," within the meaning of the privileges and immunities clause. Appellees argue that state hunting licenses constitute incidents of "regulation" and "are not an exercise of the state's taxing power." (Appellees' brief, p. 19, fn. 9.) Arguing that the distinction is well established between measures whose primary purpose is revenue for general support of government and those whose primary purpose is regulation, they cite United States v Butler, 297 U. S.1, 59-61 (1936). For all practical purposes this holding in the Butler case was eviscerated in Steward Machine Co. v Davis, 301 U. S. 548 (1936), a case which rejected a

challenge to the payroll tax of the Social Security Act, 42 U.S.C. c. 7 (supp), Title IX. Appellees also rely on Campbell v Davenport 362 F 2d 624 (1966) for the proposition that an assessment is a tax if the primary purpose is to raise revenue but not a tax if not to raise revenue. Campbell v Davenport, supra, actually found a sizeable Texas primary filing fee a tax rather than a fee because its primary purpose was to raise revenue rather than to regulate (as, for instance, to preclude nuisance candidates).

In the present case, only 2% of the revenue of the Montana Fish and Game Department comes from the general fund of Montana. (Pl. Ex. 1) The leading source of operating revenue of that Department is from license fees. (Id.) Approximately two-thirds of license fees come from nonresidents even though nonresidents constitute only approximately 13% of total hunters.[11] (Tr. p. 34.)

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[11]Don Brown testified that in 1974-1975 there were approximately 198,411 residents licensed to hunt and 31,406 nonresidents licensed to hunt. (Def. Ex. A, Tr. 26, p. 6 of Exhibit.)

In 1975 the resident paid only $4.00 for an elk license. Now the resident pays $9.00 (A. 54). It is clear that the Montana license structure is not solely a regulatory device and is not solely or directly a conservation device. It is likewise clear that nonresident hunters are compelled to subsidize inordinately the operations of the Montana Fish and Game Department. For these reasons, the nonresident hunting fee charged by Montana must be considered a "tax" or "imposition" within the meaning of the privileges and immunities clause.

Both Toomer v Witsell, supra, and Mullaney v Anderson, 342 U.S. 415 (1952) appear to take this approach, particularly in requiring that the impositions on nonresidents bear some reasonable relationship to additional enforcement burdens caused by nonresidents to the state or to "conservation expenditures from taxes which only residents pay." Mullaney v Anderson, 342 U.S. at 417. (Emphasis added.)

Appellees, for obvious reasons, attempt rigidly to fit this case into

neat categories and attempt to hinge the entire question on whether sport hunting can be considered a fundamental right. What really is at stake in the present case is the right of a person to travel into a sister state and enjoy that state's resources on a substantially equal basis. This does not mean that the resident should be compelled to subsidize the nonresident through local tax contributions. Thus, some reasonable additional fee can be assessed the nonresident on the basis of Toomer v Witsell, supra. However, Montana's scheme of gouging the nonresident to subsidize an artificially low resident contribution does not comport with the privileges and immunities clause.

Finally, the paramount purpose of the privileges and immunities clause--to promote comity among the states--must be considered. Austin v New Hampshire, supra. The erection of artificial economic barriers at the borders of the states so that only relatively wealthy nonresidents can enjoy what the sister

state has to offer cuts against this fundamental purpose.[12]

IV. THE MONTANA HUNTING LICENSE SCHEME DEPRIVES APPELLANTS OF THEIR RIGHTS TO EQUAL PROTECTION OF THE LAWS.

Appellees respond to Appellants' contention that the Montana scheme violates the equal protection clause by arguing that the Montana discrimination is a reasonable approach to the goal of conservation of the wildlife.

As noted in the Introduction, little attempt is made by Appellees to support the rationale of the District Court--that the discrimination is justified because the Montana legislature might reasonably conclude that the

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[12]Appellees argue that elk hunting in Montana is expensive for the nonresident citing a figure of $1450 in expenses (Appellees' brief, p. 3, fn. 1). For the frugal person, however, it can be relatively cheap. (Deposition of Donald Moris, p. 14: he indicated that he spent approximately $30 for gas and only $4 per night for a motel room, while hunting in Montana.)

political support of the local citizenry might evaporate in the absence of the discrimination. Rather, Appellees have attempted to re-open the factual arguments. The District Court unanimously rejected the factual arguments (See pp. 4-6, this brief). These findings of the District Court will not ordinarily be disturbed in the absence of manifest error (See fn. 5, this brief). No such clear error has been demonstrated by Appellees.

In this connection, it should be noted that a Three-Judge Federal Court has recently ruled on the big game licensing scheme in New Mexico, Terk v Gordon, ____ F. Supp. ____; (D. N.M. No. 74-387-M Civil, dec. August 25, 1977). The Court sustained in part and voided in part New Mexico's license scheme. The Court found the privileges and immunities clause inapplicable based on a similar argument made by Appellees in the present case.[13] The Court also

[13]Appellants, for the reasons stated in Section III of this brief, believe that decision is erroneous.

sustained New Mexico's fee differential,[14] finding that "...the State has made a sufficient showing that nonresidents receive the benefits of state general fund expenditures which justify the fee differential." (Slip Opinion, p. 13.) The Court found unconstitutional the New Mexico system for allocation of nonresident licenses to hunt certain exotic species which either excluded or severely restricted nonresident licenses, observing:

> It is admitted that the purpose of the allocation policy of the Game Commission is to preserve hunting of three species (Desert Bighorn; Oryx and Ibex) for New Mexico citizens. We find no conservation considerations involved and nonresidents are not a source of evil. From the Bighorn's point of view, the residency of the hunter is not relevant. (Slip Opinion, p. 14.)

[14]The ratios between the resident and nonresident fees for various species in New Mexico are generally much smaller than Montana's. E.g., big game: nonresidents--$50.75, residents--$8.00; elk: nonresidents--$75.50, residents--$15.50; ibex: nonresidents--$300.50, residents--$50.50. (Slip Opinion, p. 2.)

This appears consistent with the holding of this Court in Douglas v Seacoast Products, supra, that restrictions on nonresidents while leaving the residents free to destroy the resource cannot be considered a legitimate conservation program.

On the license fee differential issue, the New Mexico case is different from the present case in that the New Mexico Court expressly found that the state had justified the fee differential on a cost basis. In the present case the explicit finding was unanimously to the contrary. Significantly the Court in Terk did not look to other factors, such as a political justification, in its analysis of the Constitutional issues. The finding in Terk, that the restriction of nonresidents in allocating licenses for certain rare species is unconstitutional because it constitutes favoritism of state residents without a legitimate conservation purpose, is applicable to the case at hand.

It is particularly difficult to see how Montana's requirement of a combination license for nonresidents fosters a conservation purpose or any other

legitimate state purpose. Appellees refer to the statement of a Montana outfitter who testified that he would hate to take a hunter into the field who had "just a deer license or an elk license" because he would be afraid that the hunter would mistake one species for the other and take the game illegally. (Appellees' brief, p. 7, Tr. 287, 283.) This does not explain why Montana includes black bears in the required nonresident combination license. It is pretty difficult to take by mistake a black bear while hunting for a deer or an elk, particularly when the black bear is hibernating during a good part of the big game season. (Tr. p. 296) Moreover, nothing precludes an outfitter from requiring of his hunters any combination of licenses he feels necessary as a precondition to contracting for his services--that is, if an outfitter is worried that his client will mistake a deer for an elk, he can insist that the client have a deer license before he takes that person into the field. That could obviously apply to resident clients as well as nonresident

clients.[15]

Appellees cite the large percentage increase in nonresident hunters during the period 1960-1970 (530% increase in nonresidents vis-a-vis 67% increase in residents) as a justification for Montana's discriminatory scheme. Putting aside the question of whether that statistic justifies discriminating against nonresidents, the actual numbers should be examined because the percentages are misleading. The most recent year for which statistics are available is 1974-1975. In that year, there were 31,406 nonresident hunters in Montana and 198,411 resident hunters (Def. Ex. A, Tr. p. 26,

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[15]The statistics in Appellees' brief from 1973 (that 516 residents and 7,423 nonresidents employed outfitter services) are misleading because the nonresident big game hunter was required by Montana law at that time to employ an outfitter. That requirement was voided by the Montana Supreme Court in 1975 on equal protection grounds. State v Jack, 539 P 2d 726. Presently, only approximately 20% of nonresidents use outfitters. Residents also use outfitters but the percentage is smaller. (Tr., 248, 23.)

p. 6 of Exhibit). It can readily be seen from the actual numbers than nonresidents comprise only approximately 13% of the total number of hunters.

In this connection, a grievous statistical error made by the District Court was compounded by Appellees in their brief (Appellees' brief, p. 33). The Appellees argue that if license fee differentials were disallowed, Montana would have only two alternatives: (1) to impose virtually the same fee on nonresidents as on residents; or (2) to allocate licenses on the basis of population (Appellees' brief, p. 33).[16] The Court found that if the ... latter alternative were chosen, Montana residents would be entitled to only .34% of the elk licenses issued (A. 71).

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[16]It is worth mentioning again that Appellants have never argued that the Constitution requires identical fees for residents and nonresidents. Reasonable additional fees may be assessed the nonresidents based on added enforcement costs and state-borne conservation expenditures supported by resident taxes. (Toomer v Witsell, supra.)

The Appellees' brief supports the same erroneous statistical analysis (Appellees' brief, p. 33). As noted above, nonresidents constitute approximately 13% of all hunters in Montana. While this percentage might increase if the license fee differential were less, it is entirely incorrect to conclude (based on some wholly inappropriate calculations related to all hunting licenses issued by all states of the union) that Montanans would be entitled to only .34% of the hunting licenses issued in Montana if licenses were allocated on the basis of applications.

Appellees stress the finding of the District Court that limitations of the annual kill may be accomplished in many ways but all of them involve in some degree a limitation upon hunter days (Appellees' brief, p. 32, A. 67). This finding is, in the first place, incorrect factually. For instance, limitation of the annual kill can (and is) accomplished through such device as specifying the age and sex of the species in question or restricting

geographical areas without limiting hunter days.[17] In any event, there are resident-neutral criteria upon which hunter days can be limited. (Aside from a lottery system mentioned by the Court.) For example, the hunting season can be shortened. Thus, the crude and invidious economic discrimination and combination license requirement aimed at nonresidents are not necessary to the accomplishment of sound game management.

Appellees argue that the license fee differentials do not involve rate-making principles (Appellees' brief, p. 28), and that different economic principles are involved. Both Toomer v Witsell, supra, and Mullaney v Anderson, supra, set forth the standard by which nonresident fish and game

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17 The Montana Fish and Game Commission is empowered to restrict licenses sold "to a specific hunting area and may specify the species, age, and sex to be taken in order to ensure proper management and propogation of game animals..." 26.202.1(f), R.C.M.

license fees are to be judged. That standard indicates that nonresidents may be charged an additional fee resonably related to additional enforcement costs posed and/or reasonably related to tax contributions made by residents but not nonresidents to the resources. That is the principle upon which Appellenats' proof proceeded and the principle which applies to the present case. Appellees argue that some Montana landowners contribute (involuntarily) to the wildlife because wildlife feed on their lands. There is no necessary correlation between residency and landownership. For example, Plaintiff Donald Moris, Minnesota resident, is a landowner in Montana (Moris Deposition, p. 11) and suffers the same pctential for depradation--yet he is forced to pay the nonresident hunting fee.

Appellees also cite the "substantial level of General Fund expenditures by (Montana) agencies (which) directly or indirectly benefit wildlife." (Appellees' brief, p. 30.) The brief, however,

merely lists such agencies (Id.) without setting forth the amounts contributed and without systematically analyzing the contributions. These agency contributions were considered by Appellants' expert witnesses at the trial and their respective contributions were systematically analyzed (Tr. pp. 47-138, 399-441). The District Court unanimously found on the record that, with due regard to the presumption of constitutionality, the differential cannot be justified on any cost basis. The mere listing by Appellees of state agencies which make contributions to Montana's wildlife resources can hardly suffice to overcome this explicit finding by the District Court.

Finally, Appellants have argued that a declaration by this Court that Montana's big game license scheme is unconstitutional will drastically impact other states with similar statutes. It should first be noted that the big game combination license required in Montana for nonresidents but not for residents is unique to Montana. No other state

has this requirement or a substantial equivalent thereof.

Indeed, the International Association of Game, Fish and Conservation Commissioners filed an amicus brief in the District Court in support of the Montana Fish and Game Department. Explicit care was taken, however, to limit the amicus appearance only to the license fee differential issue. No support was given by that organization to Montana's combination license requirement for big game. (Page 2 of District Court brief of International Association of Game, Fish and Conservation Commissioners.)

Since no other states engage in this discriminatory combination license practice, it is obvious that a decision by this Court on that issue will have little impact on states other than Montana.

There would be more impact on other states resulting from a decision by the Court adverse to Montana on the license fee differential issue. The precise impact, however, is unclear.

Little reliance can be placed on the compilations by Appellees of state laws as set forth in the Appendix to Appellees' brief because the laws of other states are not directly comparable--largely because the combination license distorts the comparison. Most other states listed on Appellees' Appendix A appear not to have as severe a license fee differential as does Montana.

For these reasons, Appellants respectfully submit that their rights to equal protection of the laws have been violated. Given this violation, the relative impact on other states of a constitutional decision is largely irrelevant.

For the foregoing reasons, Appellants respectfully submit that the decision of the District Court should be reversed.

Respectfully submitted this 29th day of September, 1977.

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CERTIFICATE OF SERVICE

I, James H. Goetz, hereby certify that on this 29th day of September, 1977, I served true and correct copies of the foregoing brief upon Clayton R. Herron, Attorney at Law, by depositing same in a postage prepaid envelope, and mailing same and that I delivered true and correct copies to Northwest Orient Airlines to be flown to Washington, D.C. and delivered on tomorrow's date by messenger to Paul A. Lenzini, Chapman, Gadsby, Hannah & Duff, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006

_____
James H. Goetz